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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Damon Eli Richardson,
10 Petitioner,

11 v.

12 Ryan Thornell, et al.,
13 Respondents.
14

No. CV-23-02517-PHX-DLR (ESW)

ORDER

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16 Before the Court is the Report and Recommendation (“R&R”) of Magistrate Judge
17 Eileen S. Willett (Doc. 14) regarding Petitioner’s Petition for Writ of Habeas Corpus (“the
18 Petition”) filed pursuant to 28 U.S.C. § 2254 (Doc. 1). The R&R found that Grounds One,
19 Two, Four, Seven and Eight are without merit and that Grounds Three, Five, Six and Nine
20 are procedurally defaulted without excuse. The R&R recommends that the Court (1) deny
21 Grounds One, Two, Four, Seven, and Eight, (2) dismiss with prejudice Grounds Three,
22 Five, Six and Nine, and (3) deny a Certificate of Appealability and leave to proceed in
23 forma pauperis on appeal.

24 The Magistrate Judge advised the parties that they had fourteen days from the date
25 of service of a copy of the R&R to file specific written objections with the Court. (Doc. 14
26 at 21.) Petitioner filed objections to the R&R (Doc. 17) and an application for Certificate
27 of Appealability on September 10, 2024. (Doc. 18.) Respondents responded on September
28 24, 2024. (Doc. 19.) The Court has considered the Petition, Petitioner’s objections to the

1 R&R, and has reviewed the R&R de novo. *See* Fed. R. Civ. P. 72(b); 28 U.S.C. § 636(b)(1).

2 Petitioner first objects to the R&R's finding that Petitioner's habeas claims are
3 technically not cognizable. Although the R&R made such a finding, its recommendations
4 were not based on it. The R&R recommends that Grounds One, Two, Four, Seven, and
5 Eight be dismissed because Petitioner failed to show that that Arizona Court of Appeals
6 decision denying relief on those grounds was contrary to or an unreasonable application of
7 clearly established federal law or that the decision was based on an unreasonable
8 determination of the facts. The R&R recommends that Grounds Three Five and Six be
9 denied because Petitioner failed to exhaust them in state court. When presenting those
10 claims in state court, Petitioner relied exclusively on state law and did not alert the state
11 court that he was asserting federal constitutional claims. As to Ground Nine, the R&R
12 found that Petitioner did not present it as an issue of federal law to the state courts, so it
13 too was unexhausted. The R&R found that Grounds Three, Five, Six and Nine are
14 procedurally defaulted. Petitioner's objection to the R&R's finding that his habeas claims
15 are technically not cognizable is overruled.

16 Petitioner next objects to the R&R's recommendation that Ground One of the
17 Petition be denied. Petitioner argues that the Magistrate Judge should have held a hearing
18 and ordered certain "exculpatory" evidence to be produced. Petitioner argues that "the state
19 has failed repeatedly to disclose evidence that would prove innocence." (Doc. 17 at 4.)

20 The R&R discusses the evidence that Petitioner is claiming was exculpatory,
21 namely text message exchanges between Petitioner and the victim's mother. The R&R
22 notes that the Arizona Court of Appeals found there was no *Brady*¹ violation because the
23 Petitioner knew about the messages when he pled guilty, so their non-disclosure could not
24 have made his plea involuntary. Because *Brady* obligations do not typically extend to
25 information already known to the defendant, the non-disclosure is not a *Brady* violation.
26 Petitioner's objection does not argue or offer evidence to show that the Arizona Court of

27 ¹ *Brady v. Maryland*, 373 U.S. 83, 87-88 (1963) ("[T]he suppression by the
28 prosecution of evidence favorable to an accused upon request violates due process where
the evidence is material either to guilt or punishment, irrespective of the good faith of the
prosecution.").

1 Appeals rejection of his *Brady* claim is contrary to, or involved an unreasonable application
2 of, clearly established Supreme Court Precedent. *See United States v. Agurs*, 427 U.S. 97,
3 103 (1976). Petitioner's objection to the R&R's recommendation that Ground One be
4 denied is overruled.

5 Petitioner next objects to the R&R's recommendation that Ground Two be denied.
6 The Arizona Court of Appeals upheld the trial court's dismissal of Petitioner's double
7 jeopardy claim because the record shows he was charged with, and pled guilty to,
8 possessing (or attempting to possess) three separate exploitative images. Because each
9 image constitutes a separate violation under Arizona law. *See State v. Berger*, 134 P.3d
10 378, 379 (Ariz. 2006). Petitioner has failed to show that the Arizona Court of Appeals
11 rejection of his multiple conviction and sentences claim is contrary to, or involved an
12 unreasonable application of, clearly established Supreme Court precedent. Petitioner's
13 objection to the R&R's finding that Ground Two should be denied is overruled.

14 Petitioner next objects to the R&R's recommendation that Ground Four be
15 dismissed. A threat made during plea negotiations to have the accused reindicted on more
16 serious charges if the accused does not plead guilty, carried out by the prosecutor when a
17 defendant is plainly subject to prosecution for the more serious charges, is not a violation
18 of the Due process of the Fourteenth Amendment. Petitioner has failed to show that the
19 Arizona Court of Appeals denial of Ground Four is contrary to, or an unreasonable
20 application of, clearly established federal law as determined by the Supreme Court or based
21 on an unreasonable determination of the facts. Petitioner's objection to the R&R's finding
22 that Ground Four should be dismissed is overruled.

23 Petitioner next objects to the R&R's recommendation on Ground Eight, ineffective
24 assistance of counsel ("IAC"), claiming that the R&R was wrong in its finding that his
25 counsel was not ineffective for failing to investigate facts. However, the objection does not
26 point to any specific error in the findings of the R&R. It does not point to any fact counsel
27 failed to find in his investigation or share with Petitioner and which would have changed
28 the outcome of his case. The standard to be applied when assessing an IAC claim is set

1 forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Petitioner has not shown that there
 2 was a reasonable probability that, but for counsel’s unprofessional errors, the result of the
 3 proceeding would have been different. Assuming the facts being alleged by Petitioner are
 4 Defense counsel’s possession of the text messages between Petitioner and the victim’s
 5 mother, Petitioner has not shown that disclosure of those text messages would have
 6 impacted his decision to plead guilty. Petitioner has not shown that the Arizona Court of
 7 Appeals determination that the prosecutor and the trial counsel did not commit misconduct
 8 is contrary to, or an unreasonable application of, clearly established federal law as
 9 determined by the Supreme Court, or based on an unreasonable determination of the facts.
 10 Petitioner has not shown that his counsel provided ineffective representation. Petitioner’s
 11 objection to the R&R’s finding that Ground Eight should be denied is overruled.

12 Petitioner next objects to the R&R’s recommendation that Grounds Three, Five,
 13 Six, and Nine be dismissed for being procedurally defaulted. Petitioner argues that because
 14 he did not engage in intentionally dilatory litigation tactics, he should be granted a “Stay-
 15 and -abeyance” ruling on those Grounds. However, Petitioner is unable to return to state
 16 court to properly exhaust those claims because it is too late under the state’s procedural
 17 rules. A stay would be futile. Petitioner’s objection to the R&R’s recommendation that
 18 Grounds Three, Five, Six, and Nine be dismissed for being procedurally defaulted is
 19 overruled.

20 **IT IS ORDERED** as follows:

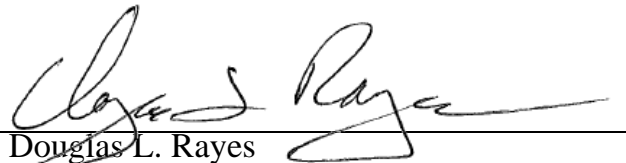
- 21 1. Petitioner’s objections (Doc. 17) are **OVERRULED**;
- 22 2. Petitioner’s “Application for Certificate of Appealability from the District
 23 Court” (Doc. 18) is **DENIED**;
- 24 3. The R&R (Doc.14) is **ACCEPTED**;
- 25 4. Petitioner’s Petition for Writ of Habeas Corpus filed pursuant to 28 U.S.C. §
 26 2254 (Doc. 1) is **DISMISSED** with prejudice;
- 27 5. A Certificate of Appealability and leave to proceed in forma pauperis on appeal
 28 are **DENIED** because the dismissal of the Petition is justified by a plain

1 procedural bar and jurists of reason would not find the procedural ruling
2 debatable, and Petitioner has not made a substantial showing of the denial of a
3 constitutional right;

4 6. The Clerk of the Court shall enter judgment accordingly and terminate this case.

5 Dated this 28th day of January, 2025.

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Douglas L. Rayes
Senior United States District Judge